BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DENNIS P. VANBECELAERE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,044,984
B & H CONSTRUCTION, INC.	)	
Respondent	)	
AND	)	
	)	
UNION INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the June 17, 2009, preliminary hearing Order of Administrative Law Judge Kenneth J. Hursh (ALJ). Claimant was awarded medical treatment after the ALJ determined that the drug test administered to claimant was not admissible under the Kansas Workers Compensation Act (Act) and no other evidence of impairment existed in this record.

Claimant appeared by his attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Nathan D. Burghart of Lawrence, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the deposition of Barbara Plummer taken June 9, 2009, with attachments; the evidentiary deposition of David Kuntz, Ph.D., taken June 12, 2009, with attachments; the transcript of Preliminary Hearing held June 16, 2009, with attachments; and the documents filed of record in this matter.

ISSUES

Respondent raises the following issues on appeal from the preliminary hearing Order of June 17, 2009:

> "1. Whether the ALJ erred in refusing to admit the results of a drug test into evidence when such results were previously offered into evidence at an evidentiary deposition and no objection was raised by claimant's counsel?
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> "2. Whether the results of the drug test performed on claimant should be admitted into evidence and whether benefits should be denied in this case due to the "intoxication defense" contained in K.S.A. 44-501(d)(2)?"[1]

Claimant raised the following issues in his brief to the Board:

1. Claimant argues that the drug test was not admissible under the Act, notwithstanding the lack of an objection when the test was offered. Claimant contends the consent to the document was not a waiver of the requirements of K.S.A. 2008 Supp. 44-501 to prove impairment.

2. Claimant also contends the six requirements contained in K.S.A. 2008 Supp. 44-501(d)(2) have not all been met.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant is a laborer for respondent, a concrete company. As part of his job duties, claimant helped pour concrete basements, floors, walls and foundations. On January 22, 2009, claimant went to work for respondent at approximately 7:00 a.m. On that date, claimant was assisting in the pouring of concrete walls at Pittsburg State University. The forms being used were 9 feet tall. Claimant's task on that day was to walk on the top of the concrete forms after the concrete was poured and attach anchor bolts to the forms to keep the width of the walls consistent. This task required that claimant stand on the 2-inch wide forms and walk backwards as he attached the bolts. By approximately 3:30 p.m., claimant had completed the attachments on one 60-foot length of wall and was in the process of attaching the bolts to another 50-foot length of wall when he came to an "egress window", where the wall suddenly dropped to a 4-foot height. When claimant started to

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[1] Respondent's Application for Review at 1.

cross the opening, his foot slipped on a wet patch and claimant fell, striking the forms and two-by-fours used to support the forms. Claimant fell on his left shoulder, arm, wrist and hand, and also injured his head and neck. Claimant was taken to Mount Carmel Regional Medical Center where he was treated for the various injuries. After the treatment was completed, but before claimant left the medical center, he was asked by Barbara Plummer, a licensed practical nurse (LPN) at Mount Carmel Regional Medical Center, to provide a urine sample, which claimant did. The sample was sent to Clinical Reference Laboratory and tested. The sample came up positive, showing 60 ng/ml of Marijuana Metabolite. However, even though claimant had been administered a number of pain killers, identified as opiates, claimant's urine test registered negative for opiates. The sample was collected at 7:02 p.m. Claimant testified that he has never smoked marijuana.

Ms. Plummer has been an LPN since 1974 and currently works in the Occupational Health department at the medical center. Ms. Plummer testified that she was supervised by the department director, Kent Coltharp, D.O. Ms. Plummer has taken over one thousand urine samples over the years. Even though she is an LPN, when asked if she was licensed by any governing body, Ms. Plummer answered, "No".[2] Ms. Plummer was notified that a patient in the emergency room needed a drug screen. She testified that the test performed on claimant was the Department of Transportation (DOT) drug screen, which she identified as the federal drug screen. She also testified that respondent had submitted forms to the medical center identifying the federal test as the one of choice. However, claimant denied that there was a written policy from respondent regarding the appropriate drug test to be used in this circumstance. After the urine sample was obtained, Ms. Plummer filled out a Federal Drug Testing Custody and Control Form[3] for the sample obtained from claimant. She described, in detail, the procedure utilized in obtaining the sample and the steps taken to handle and transfer the sample to Clinical Reference Laboratory. Ms. Plummer testified that she obtained the sample, transferred it to the appropriate containers, labeled the containers herself and placed it in a locked courier box for transport and delivery to Clinical Reference Laboratory. Claimant signed the form in Ms. Plummer's presence, and his signature was torn off and placed with the specimens. (Exhibit 1 and Exhibit 2 to the Plummer Deposition are identical, with the exception that Exhibit 2 still has claimant's signature attached. Claimant's Social Security number is on both exhibits.)

David Kuntz, Ph.D., the executive director of analytical toxicology at Clinical Reference Laboratory, testified regarding the tests done on the sample urine specimen obtained from claimant. Clinical Reference Laboratory is approved by the U.S. Department of Health and Human Services and tests approximately 3.3 million samples per year.

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[2] Plummer Depo. at 5.

[3] Plummer Depo., Ex. 1.

The chain of custody of the sample was testified to in detail and the results of the test were confirmed by gas chromatography-mass spectrometry (GC-MS). The initial test showed a positive marijuana metabolite level, and the GC-MS test then confirmed the result. During the deposition of Dr. Kuntz, Exhibit 2, including the records from Clinical Reference Laboratory dealing with claimant's urine test, was identified and placed into evidence without objection. At the time of the preliminary hearing, claimant's counsel objected to the blood tests, arguing first that the depositions were noticed as discovery depositions. When respondent advised that the depositions were noticed as evidentiary depositions, and the ALJ noted the depositions were listed as evidentiary depositions, claimant's attorney then objected to the results of the blood test. The ALJ ruled that the results of the blood tests were not admissible under the Act and held that the consent to the document was not a waiver of the requirements of K.S.A. 2008 Supp. 44-501 regarding admissibility to prove impairment. The ALJ refused to admit the results of the urine test after finding that Ms. Plummer was, by her own admission, not licensed, and determining respondent had failed to comply with the requirements of the Act.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[4]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[5]

K.S.A. 2008 Supp. 44-501(d) states in part:

> (2) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens. In the case of drugs or medications which are available to the public without a prescription from a health care provider and prescription drugs or medications, compensation shall not be denied if the employee can show that such drugs or medications were being taken or used in therapeutic doses and there have been no prior incidences of the employee's

[4] K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

[5] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

impairment on the job as the result of the use of such drugs or medications within the previous 24 months. It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that at the time of the injury that the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:

	Confirmatory test cutoff levels (ng/ml)
Marijuana metabolite [1]	15

. . .

An employee's refusal to submit to a chemical test shall not be admissible evidence to prove impairment unless there was probable cause to believe that the employee used, possessed or was impaired by a drug or alcohol while working. The results of a chemical test shall not be admissible evidence to prove impairment unless the following conditions were met:

(A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;

(B) the test sample was collected at a time contemporaneous with the events establishing probable cause;

(C) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;

(D) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;

(E) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and

(F) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee.

(3) For purposes of satisfying the probable cause requirement of subsection (d)(2)(A) of this section, the employer shall be deemed to have met their burden of proof on this issue by establishing any of the following circumstances:

(A) The testing was done as a result of an employer mandated drug testing policy, in place in writing prior to the date of accident, requiring any worker to submit to testing for drugs or alcohol if they are involved in an accident which requires medical attention;

(B) the testing was done in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and was not at the direction of the employer; however, the request for GCMS testing for purposes of

> confirmation, required by subsection (d)(2)(E) of this section, may have been at the employer's request;
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> (C) the worker, prior to the date and time of the accident, gave written consent to the employer that the worker would voluntarily submit to a chemical test for drugs or alcohol following any accident requiring the worker to obtain medical treatment for the injuries suffered. If after suffering an accident requiring medical treatment, the worker refuses to submit to a chemical test for drugs or alcohol, this refusal shall be considered evidence of impairment, however, there must be evidence that the presumed impairment contributed to the accident as required by this section; or
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> (D) the testing was done as a result of federal or state law or a federal or state rule or regulation having the force and effect of law requiring a post accident testing program and such required program was properly implemented at the time of testing.

In this record, when the test results were offered into the record, claimant had no objection. To later object to the admissibility of the test results, after the depositions of the chain of custody witnesses have already been taken, is disingenuous. However, K.S.A. 2008 Supp. 44-501 lists numerous hurdles which must be overcome before the results of a chemical test may be admitted into evidence and the results considered under the Act.

The ALJ determined that no evidence of a mandatory testing policy by respondent is contained in this record. Ms. Plummer testified that respondent had submitted forms which specified which test was to be performed. While claimant testified that no such form existed, nevertheless, the medical center had in its possession a form specifying the exact test to be run. This satisfies the probable cause aspect of the statute. The collection of the sample contemporaneous with the events establishing probable cause also is supported by this record. Ms. Plummer was notified that a test needed to be made in the emergency room. When she arrived, claimant was there as an employee of respondent. The existence of the form specifying the proper test to be run was known to her and the test was immediately run. This test was performed at the end of the treatment sequence and before claimant left the medical center. The Kansas Supreme Court has determined that "probable cause need only occur contemporaneously with the events establishing probable cause".[6] Therefore, the finder of fact is permitted to consider both pre-accident facts as well as those occurring post-accident in determining whether probable cause exists for testing an employee. This Board Member finds that probable cause existed for the taking of this test.

The sample must also be taken by or under the supervision of a licensed health care professional. Ms. Plummer is an LPN. This implies that some form of license is required. But, when asked, Ms. Plummer denied being licensed by any governing body.

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[6] *Foos v. Terminix*, 277 Kan. 687, 89 P.3d 546 (2004).

The Board considered the licensing of LPNs in *Roush.*[7] In *Roush*, the drug screen was performed by an LPN before she had taken her "boards". Therefore, she was not a "licensed" practical nurse at the time. The LPN took and passed the boards one month after the drug screen was administered, but not on the day of the test. The test was ruled inadmissable as the LPN was not a "licensed health care professional" on the date of the test.

Here, Ms. Plummer identified herself as an LPN but stated that she was not licensed by any governing body. Thus, the requirements of K.S.A. 2008 Supp. 44-501 have not been met. The tests run on claimant are, therefore, rendered inadmissable. The determination by the ALJ to exclude the tests is affirmed. The parties stipulated at the preliminary hearing that, should the matter be ruled compensable, then the authorized treating physician, Michael Zafuta, M.D., would re-commence treatment and temporary total disability benefits would be reinstated from the date last paid.[8]

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The drug tests run on claimant do not satisfy the requirements of K.S.A. 2008 Supp. 44-501 and are not admissible in this matter at this time. The exclusion of the test results by the ALJ is affirmed and the award of benefits to claimant remains in full force and effect.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated June 17, 2009, should be, and is hereby, affirmed.

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[7] *Roush v. Herff Jones, Inc.*, No. 1,027,354, 2007 WL 3348534 (Kan. WCAB Oct. 31, 2007).

[8] P.H. Trans. at 4-5.

[9] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of September, 2009.

HONORABLE GARY M. KORTE

c: William L. Phalen, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge